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## **A Comparison Of the Federal and New York State Rape Shield Statutes**

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## A COMPARISON OF THE FEDERAL AND NEW YORK STATE RAPE SHIELD STATUTES

*Hon. George C. Pratt:*

Good afternoon. Welcome back to this symposium on comparing New York and Federal Evidence law, or, if you were not here this morning, welcome initially. We are proceeding this afternoon with, first, Professor Deborah Stavile Bartel, who will talk about Rape Shield Laws, followed by Professor Barry Scheck on expert testimony, particularly the *Daubert* case in the Supreme Court and the influence that has had, and finally, Professor Gary Shaw on hypnotically-refreshed testimony. That will, in part, leave us with a little more time at the end for free-for-all questions or comments from the audience, so arm yourself with any interesting problems that may occur to you that our panelists may be able to deal with. So, we will proceed with Professor Bartel.

*Professor Deborah Stavile Bartel\*:*

### INTRODUCTION

Thank you, Judge Pratt. I am going to talk this afternoon about the differences between the rape shield statutes of the Federal Rules of Evidence<sup>1</sup> and New York Criminal Procedure Laws.<sup>2</sup>

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1. The federal rape shield statute is embodied in Federal Rule of Evidence 412. Rule 412 states:

- (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.
- (b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of a victim's past sexual behavior other

than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is--

- (1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or
  - (2) admitted in accordance with subdivision (c) and is evidence of--
    - (A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
    - (B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.
- (c)(1) If the person accused of committing an offense under chapter 109A of title 18, United States Code intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.
- (2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.
- (3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence

Before I begin to discuss these statutes, which are only about twenty years old, I would like to talk for a moment about what the law had previously been.

You may remember that Professor Jim Kainen spoke this morning about the admissibility in certain instances of a victim's character-- if relevant.<sup>3</sup> Before the enactment of Rape Shield Laws, which are exclusionary rules by and large, a victim's character for unchastity was thought to be relevant to the question of whether she consented to the act of sexual intercourse or sodomy, as the case might be, on a particular occasion.<sup>4</sup> So,

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which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which an offense under chapter 109A of title 18, United States Code is alleged.

FED. R. EVID. 412.

2. The New York rape shield statute is embodied in New York Criminal Procedure Law section 60.42. Section 60.42 provides:

Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the penal law unless such evidence:

1. proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or
2. proves or tends to prove that the victim has been convicted of an offense under Section 230.00 of the penal law within three years prior to the sex offense which is the subject of the prosecution; or
3. rebuts evidence introduced by the people of the victim's failure to engage in sexual intercourse, deviate sexual intercourse or sexual contact during a given period of time; or
4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or
5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).

3. See James L. Kainen, *Character Evidence*, 11 *TOURO L. REV.* \_\_\_, (1994).

4. See Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 *COLUM. L. REV.* 1, 15 (1977). This article discussed, in

before these laws, it was fair game to question any complainant in a rape case as to her prior sexual history.<sup>5</sup> I am going to use the feminine pronoun to refer to victims of rape because the vast majority of the reported cases in the federal and New York State courts' appellate decisions involve women victims; there were, however, plenty of boy victims in cases involving the sexual assault of minors. Additionally, I will use the masculine pronoun to refer to defendants because most, not all, persons accused of sexual assault are men.

Because lengthy cross-examination with respect to complainants' prior acts of unchastity or sexual conduct was the norm, complainants seldom brought rape charges.<sup>6</sup> Rape was one of the least reported violent crimes in the country.<sup>7</sup> Cross-examination into, or independent evidence of, the complainant's prior sexual conduct was also thought to unnecessarily harass the victim, embarrass the victim, and confuse the jury. Allowing such cross-examination or other evidence worked against the fair administration of justice. The jury was given information which may have been completely irrelevant to the issue of the complainant's consent on any particular occasion, but it may have used that information about the alleged victim's prior unchastity

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part, how the victim's unchastity was relevant to whether she consented to an act which led to rape charges. "The underlying thought here is that it is more probable that an unchaste woman would assent . . . than a virtuous woman." *Id.* (quoting *People v. Collins*, 186 N.E.2d 30, 33 (Ill. 1962)).

5. *Id.*

6. See 124 CONG. REC. H34913 (1978) (statement of Rep. Holtzman). Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.

*Id.*

7. See Ronet Bachman, Ph.D. & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 565-66 (1993) (stating that there has been a 10% to 13% increase in reported rapes from the years 1980 to 1990 due in part to rape reform legislation).

or promiscuity against her.<sup>8</sup> Thus, defendants who may have been responsible for violent acts of rape were acquitted because of prejudice against sexually active women. To address these problems, all but two state jurisdictions have now enacted exclusionary rules prohibiting the admissibility of such evidence except in exceptional circumstances.<sup>9</sup>

## I. FEDERAL RULE OF EVIDENCE 412

Let us take a look, first, at Federal Rule of Evidence 412, the federal Rape Shield Law. This law, adopted in 1978, was mostly intended as a model statute. Actually, there are not that many times when the federal courts have jurisdiction over the crime of rape. The rape would have to occur some place like an Indian reservation or in a federal courthouse or on Amtrack. It has to occur someplace where the federal authorities have jurisdiction.

How does the federal rape shield law work? Federal Rule of Evidence 412(a) bans all evidence of the complainant's reputation; it also bans all opinion evidence as to her chastity.<sup>10</sup> Federal Rule of Evidence 412(b) admits specific acts of a victim's prior sexual conduct in three limited circumstances: first, (b)(1) admits such acts whenever the constitution requires the admission of the complainant's prior sexual conduct;<sup>11</sup> second, (b)(2)(A) permits the complainant's prior sexual conduct with persons other than the accused to be admissible for two

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8. See *supra* note 6 and accompanying text; see also Richard A. Wayman, *Lucas Comes to Visit Iowa: Balancing Interests Under Iowa's Rape-Shield Evidentiary Rule*, 77 IOWA L. REV. 865 (1992). A jury could infer from a victim's unchastity that she probably consented to have sexual intercourse. *Id.* at 870. "A woman's unchaste character was viewed as a badge of her credibility since promiscuity implied dishonesty, and the testimony of a woman who had poisonously tainted her body with sexual impropriety was given less weight." *Id.*

9. Arizona and Utah are the two states without rape shield laws. David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1219 n.2 (1985).

10. FED. R. EVID. 412(a).

11. FED. R. EVID. 412(b)(1).

limited purposes, so that the defendant can disclaim being the source of semen on the occasion in question, and disclaim responsibility as the source of injury caused to the complainant;<sup>12</sup> and third, (b)(2)(B) allows evidence of the complainant's prior sexual conduct with the defendant only so long as it bears relevancy to the issue of her consent, or on the reasonableness of his belief that she has consented.<sup>13</sup> So, those are the limited instances when the federal rules would admit evidence of the prior sexual conduct of a complainant in a rape case.

If evidence is admissible, nonetheless, Federal Rule of Evidence 412(c) imposes very strict notice and hearing requirements.<sup>14</sup> A defendant who wishes to offer any such evidence must make a written motion at least fifteen days before the trial begins, explaining his offer of proof in writing and why it comes within one of the 412(b) exceptions.<sup>15</sup> He must serve this motion on all of the parties to the action<sup>16</sup> including: the government, and any codefendants. He must also serve the motion papers on the victim.

Rule 412(c) then requires the court to hold a hearing,<sup>17</sup> after which the court must make a determination whether the evidence is within one of the 412(b) exceptions and whether its probative value outweighs its prejudicial effect.<sup>18</sup> If the court determines the evidence of the victim's prior sexual history to be admissible, the court must then issue an order, outlining specifically what is admissible and the areas of cross-examination for the complainant.<sup>19</sup> Federal Rule of Evidence 412 has been construed to confer standing on a victim to appeal an adverse ruling. Consequently, if evidence is ruled admissible about the victim's

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12. FED. R. EVID. 412(b)(2)(A).

13. FED. R. EVID. 412(b)(2)(B).

14. FED. R. EVID. 412(c).

15. FED. R. EVID. 412(c)(1).

16. *Id.*

17. FED. R. EVID. 412(c)(2).

18. FED. R. EVID. 412(c)(3). This balancing test is different than the one imposed under Federal Rule of Evidence 403.

19. *Id.*

prior sexual conduct, the victim herself has the right to take an appeal.<sup>20</sup>

Now, as an exclusionary rule, Federal Rule of Evidence 412 obviously touches on the defendant's Sixth Amendment Confrontation Clause rights,<sup>21</sup> right to compulsory process of evidence in his behalf,<sup>22</sup> right to testify in his own behalf,<sup>23</sup> and may implicate the due process right to a fair trial.<sup>24</sup> These implications do not render the statute unconstitutional.<sup>25</sup> The Supreme Court has upheld restrictions on a defendant's right to

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20. See *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981). The court in *Doe* held that the victim was allowed to appeal the ruling by the trial judge, in a pre-trial hearing, which would have permitted evidence of the victim's reputation, habit, and sexual conduct. *Id.* "The rule makes no reference to the right of a victim to appeal an adverse ruling. Nevertheless, this remedy is implicit as a necessary corollary of the rule's explicit protection of the privacy interests Congress sought to safeguard." *Id.* at 46.

21. U.S. CONST. amend. VI. The Confrontation Clause of the Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

22. U.S. CONST. amend. VI. The Compulsory Process Clause of the Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy . . . compulsory process for obtaining witnesses in his favor." *Id.*

23. A defendant's right to testify in his or her own behalf is found in the Fifth, Sixth and Fourteenth Amendments. *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987). "The opportunity to testify is . . . a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* at 52 "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment." *Id.* (quoting *Washington v. Texas*, 388 U.S. 14, 17-19 (1967)) "The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony . . . ." *Id.* at 51.

24. U.S. CONST. amend. V. The Due Process Clause of the Fifth Amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." *Id.*

25. See *infra* notes 30-32 and accompanying text.



cross-examine,<sup>26</sup> right to offer substantive testimony,<sup>27</sup> and has upheld notice requirements.<sup>28</sup> The Court has not invalidated a statute where the defendant could be precluded from offering evidence relevant for his failure to comply with notice requirements.<sup>29</sup> The Court held, in *Michigan v. Lucas*,<sup>30</sup> that Rape Shield Laws are not per se unconstitutional because of such requirements.<sup>31</sup> The court must examine the statute's application

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26. See *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). "Trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 679; see also *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (holding that the Confrontation Clause provides a criminal defendant with "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish").

27. See *Rock v. Arkansas*, 483 U.S. 44 (1987) (holding that relevant testimony may be precluded); see also *Chambers v. Mississippi*, 410 U.S. 284 (1973). "In the exercise of [the right to present witnesses in one's own defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* at 302. As well, a criminal's right to cross-examine "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.* at 295.

28. See *Wardius v. Oregon*, 412 U.S. 470, 474 (1973) (stating that notice requirements are "a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system"); see also *Williams v. Florida*, 399 U.S. 78 (1970) (holding that a criminal defendant is required to notify the State of any alibi witnesses that he intends to call at trial). But see *Rock*, 483 U.S. at 56 (holding that restrictions on notice requirements "may not be arbitrary or disproportionate to the purposes they are designed to serve").

29. *Michigan v. Lucas*, 500 U.S. 145, 151 (1991). See *United States v. Nobles*, 422 U.S. 225 (1975) (precluding an investigator from testifying on behalf of the defense because the defendant failed to provide a copy of the investigator's report to the prosecution).

30. 500 U.S. 145 (1991).

31. *Id.* at 153. The Court stated that adopting a per se rule holding unconstitutional all rape shield statutes that permit the preclusion of evidence of prior sexual relations between the victim and the defendant, when the defendant fails to comply with the notice and hearing requirements of the statute, was erroneous. *Id.* at 152-53.

in every instance, because of such requirements, to determine whether the preclusion of substantive evidence or the preclusion for failure to comply with the notice requirements in a particular case violated one of the defendant's constitutional rights.<sup>32</sup> Defendants have no constitutional right to present irrelevant evidence, and Rule 412 adopts a policy that evidence of a victim's prior lack of chastity, or promiscuity, is irrelevant to the issue of whether she consented to sexual intercourse on the particular occasion in question.<sup>33</sup>

Not only does the defendant have no constitutional right to offer irrelevant evidence, the Supreme Court further recognizes that there may be legitimate restrictions placed on a defendant's right to offer even relevant evidence. A defendant has no right to offer relevant evidence free from the restrictions, the legitimate restrictions, of the adversarial process. A defendant cannot avoid the reasonable notice and written motion requirements of a statute.<sup>34</sup> Whether or not preclusion is an appropriate sanction for defense failure to comply with reasonable notice and written motion requirements depends on whether preclusion of the defendant's evidence is arbitrary or disproportionate to the legitimate interests which the Rape Shield Law is designed to serve: namely, to avoid unnecessary harassment of the victim; to avoid surprise to the prosecution where the prosecution cannot investigate claims of prior sexual conduct to refute them; and to eliminate irrelevant evidence which would confuse the jury.<sup>35</sup>

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32. *Michigan v. Lucas*, 484 N.W.2d 685, 687 (Mich. Ct. App. 1992) (“[A] determination whether the notice requirement violated a defendant's right of confrontation must be made case by case.” (citing *Lucas*, 500 U.S. at 149)).

33. *United States v. Duncan*, 855 F.2d 1528, 1533 (11th Cir. 1988) (“Rule 412 was premised on the precept that an accused does not have a constitutional right to present irrelevant evidence, and ‘reputation and opinion concerning a victim's past sexual behavior are not relevant indicators of the likelihood of her consent to a specific sexual act or of her veracity.’” (quoting *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981))), *cert. denied*, 489 U.S. 1029 (1989).

34. FED. R. EVID. 412(c).

35. *Lucas*, 500 U.S. at 152-53 (“The notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay.”).

There is another instance when preclusion has been upheld by the Supreme Court, even if it is a disproportionate remedy - where the defendant's violation of the discovery rules, such as the notice requirement, is willful or designed to gain a tactical advantage.<sup>36</sup> In such instance, the Court has also suggested that preclusion may be an appropriate remedy even if a less harsh remedy, a less harsh penalty, would advance the government's interest.<sup>37</sup> In sum, whether or not the Due Process Clause or the Confrontation Clause is implicated depends on a case-by-case fact-specific analysis of what was offered by the defense or the weight of the reasons why the defendant failed to comply with the notice or other procedural requirements.

Now, let us look at the different provisions of Rule 412 in sequence. Federal Rule of Evidence 412(a) bans all reputation and opinion evidence as to a complainant's prior lack of chastity.<sup>38</sup> I have to question whether or not an absolute ban on reputation and opinion evidence is constitutional. Sometimes the ban may not infringe upon constitutional guarantees of the defendant, but sometimes it may. For example, reputation or opinion evidence may be the best evidence available to a particular defendant to prove one of the exceptions under the statute -- one exception that the statute recognizes and authorizes is the admission of evidence of the complainant's past sexual history with the defendant or others. So, for example, the defendant may wish to offer evidence of the complainant's prior sexual conduct with another to explain the source of semen or injury to the complainant, and yet the person whom he wishes to call, who has personal knowledge, may be unavailable, may be out of the jurisdiction, or may be deceased. It may be that the

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36. See *Taylor v. Illinois*, 484 U.S. 400, 417 (1988) (precluding the calling of a witness when defendant interviewed the witness the week before the trial began and amended his Answer, but failed to give notice of the witness to the prosecution).

37. *Lucas*, 500 U.S. at 152-53. The Court reasoned that preclusion would be appropriate because a "less severe penalty 'would perpetuate rather than limit the prejudice to the State and the harm to the adversary process.'" *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 413 (1988)).

38. FED. R. EVID. 412(a).

best evidence available to a defendant in a particular instance is reputation or opinion evidence. Should such an offer otherwise survive the hearsay rules, the absolute ban of reputation evidence may, in that instance, be unconstitutional as a violation of the due process right to present evidence in one's defense and to a fair trial.

In the *Doe*<sup>39</sup> case, a Fourth Circuit case, the complainant was known by the defendant to have a habit of hanging around the army barracks and the snack bar, was known to be promiscuous, and was known to call out verbally to different soldiers who passed by.<sup>40</sup> When the defendant presented his defense against a charge of rape brought by this complainant, he wished to adduce evidence of her reputation and his knowledge of her reputation.<sup>41</sup> The *Doe* court held that although reputation and opinion evidence is barred by the rule, such evidence may bear on the state of mind of the defendant in making a reasonable mistake of fact about whether the complainant consented to sexual intercourse with him on the particular occasion.<sup>42</sup> In that case, the *Doe* court ruled reputation and opinion evidence ought to be admissible if that is the evidence that was available to prove the defendant's state of mind, an element of the crime. Recently, the Fourth Circuit has questioned the wisdom of that reasoning.<sup>43</sup> I think the Fourth Circuit was right the first time in *Doe*, that sometimes reputation and opinion evidence bearing on the state of mind of the defendant or to prove one of the other 412(b) exceptions may be constitutionally required because so long as it is relevant, it may be the only or best available evidence to the defense.

Federal Rule of Evidence 412(b) excludes evidence of the complainant's prior sexual conduct except in limited instances. Federal Rule of Evidence 412(b)(1) would allow such evidence when the Constitution requires.<sup>44</sup> When does the Constitution

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39. *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981).

40. *Id.* at 47.

41. *Id.* at 45.

42. *Id.* at 48.

43. See *United States v. Saunders*, 943 F.2d 388 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1199 (1992).

44. FED. R. EVID. 412 (b)(1).

require evidence of the complainant's prior sexual conduct? Whenever due process,<sup>45</sup> or the Confrontation Clause,<sup>46</sup> or the right to testify in one's behalf,<sup>47</sup> the right to present evidence is implicated. This is a very fact-specific analysis. One must understand the relationship of the proffered evidence to the defendant's theory of his defense in the particular case. So, let me just talk about a couple of examples when the Constitution has been found to require evidence of a complainant's prior sexual conduct.

In the *Bear Stops*<sup>48</sup> case, the Eighth Circuit held that evidence of a child victim's prior sexual conduct was admissible because it was constitutionally required to explain on an alternative basis the evidence the government introduced that this child suffered from child abuse syndrome, and that this child had exhibited certain manifestations of behavior, such as bed-wetting and aggressiveness towards other children, that were consistent with child sexual abuse syndrome.<sup>49</sup> In *Bear Stops*, the court also held that the Constitution required the admission of the child's prior sexual conduct, which by the way was another rape occurring at about the same time as the alleged offense, to explain evidence offered by the government of blood appearing on the child's underwear.<sup>50</sup>

In the *Begay*<sup>51</sup> case, the Tenth Circuit held that the child complainant's prior sexual conduct was constitutionally admissible to explain medical testimony that she had an enlarged

45. *See supra* note 24.

46. *See supra* note 21.

47. *See supra* note 23.

48. *United States v. Bear Stops*, 997 F.2d 451 (8th Cir. 1993).

49. *Id.* at 454. During the trial, a "social worker testified that abused children often exhibit regressive behaviors . . . and . . . may also act out sexually as a result of the emotional trauma caused by the abuse." *Id.*

50. *Id.* at 458. The appellate court stated that "[a]bsent any proof of the type of and the timing of the [prior] sexual assault . . . the jury likely concluded that the alleged bloody underwear could only be the result of sexual abuse . . . " by the defendant. *Id.*

51. *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991).

hymen that was consistent with penetration.<sup>52</sup> In *Stamper*,<sup>53</sup> *Cardinal*,<sup>54</sup> and *Bartlett*,<sup>55</sup> the respective Circuits held that a rape complainant's prior claims of sexual abuse or rape fell within the prohibition of Rule 412, because they were evidence of the complainant's prior sexual conduct, and thus, the evidence could not be introduced at trial unless constitutionally required or otherwise within an exception of Federal Rule of Evidence 412.<sup>56</sup>

One may take issue with this. I mean, one can look at a prior claim of sexual abuse or rape not as the complainant's sexual conduct, but as another act of reporting an incident to someone in authority. Of course, a prior report of sexual abuse or a rape may be quite intertwined with prior sexual conduct, although one has to question whether a prior instance of rape or sexual abuse constitutes sexual conduct of the complainant or something else, such as an act of aggression, sexual in nature, perpetrated on the complainant, but not her own sexual conduct. And the report made by the complainant is certainly not sexual conduct, although the report contains evidence of her sexual attack. I do

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52. *Id.* at 520. The court noted that "the right to defend by cross-examination showing that the conditions could have resulted from earlier conduct with another person was crucial and protected by Rule [412(b)(2)(A)]." *Id.*

53. *United States v. Stamper*, 766 F. Supp. 1396 (W.D.N.C. 1991), *aff'd sub nom. In re One Female Juvenile Victim*, 959 F.2d 231 (4th Cir. 1992).

54. *United States v. Cardinal*, 782 F.2d 34 (6th Cir.), *cert. denied*, 476 U.S. 1161 (1986).

55. *United States v. Bartlett*, 794 F.2d 1285 (8th Cir.), *cert. denied*, 479 U.S. 934 (1986).

56. *See Stamper*, 766 F. Supp. at 1404 (finding that the absence of evidence regarding prior charges "would deprive the jury members of substantial information relevant to their duty of witness credibility assessment"); *see also Bartlett*, 794 F.2d at 1292 n.8 (noting that "[a]lthough the district court did not explicitly find that testimony of the victim's prior false accusation of rape would be admissible under rule 412(b)(1), it is necessarily subsumed in the court's conclusion that Bartlett was prejudiced by the loss of this testimony"). *But see Cardinal*, 782 F.2d at 36 (stating that the primary purpose of Rule 412 is to "protect rape victims from degrading and embarrassing disclosure of intimate details about their private lives" and that prior claims of rape are encompassed within this (quoting 124 CONG. REC. H11944 (daily ed. Oct. 10, 1978) (statement of Rep. Mann))).

not think that Rule 412 necessarily needs to be construed to prohibit all evidence of the complainant's prior claims of rape, but two circuits, in addressing the issue, have so held;<sup>57</sup> and those are the only two circuits that have answered the question. Should there be proof that the complainant's prior reports of rape were falsely made, to deny this evidence might be a denial of defendant's confrontation clause right. Therefore, this ban ought to be examined on a case by case basis.

In the *Bartlett* and *Cardinal* cases, the prior claims of rape by the children complainants were held not to be constitutionally required to be admitted because the defendant had not shown that the prior claims were false.<sup>58</sup> Therefore, they did not bear on a motive to fabricate or a pattern of fabrication and did not bear on the credibility of the complaining witness.<sup>59</sup> In the *Stamper* case, however, the court held that the 412(b)(1) constitutional exception required admission of the prior false claims of sexual abuse because a pattern had been established, one of a girl trying to switch homes from her mother to her father, from her father to her mother, by making allegations of sexual abuse against the friends of whichever parents she was living with when she wished to leave that home.<sup>60</sup> So, because it established a motive of fabrication, the *Stamper* court held the Constitution required the defendant be permitted to prove these prior possibly false

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57. The Fourth Circuit, in *Stamper*, and the Eighth Circuit, in *Bartlett*, have so held; see cases cited *supra* note 56.

58. In *Bartlett*, the court held that the defendant had not carried his burden of proving that he suffered "substantial" prejudice without testimony from a deceased witness who would have testified that the victim made a prior false accusation of rape against the defendant. 794 F.2d at 1292-93. In *Cardinal*, the court focused on the policy behind Rule 412 and found that a thirteen year old girl should be protected from demeaning and embarrassing events that had taken place in her private life. 782 F.2d at 36.

59. In *Bartlett*, the court found that the probative evidence of the alleged prior false accusation was very weak in that the accusation dealt with different circumstances than the incident in question. 794 F.2d at 1292. In *Cardinal*, the appellate court quoted the lower court that "'evidence of a [thirteen year old] victim's past sexual behavior [cannot be separated] from the fact that she had made an allegation of rape and then withdr[ew] it.'" 782 F.2d at 36.

60. *Stamper*, 766 F. Supp. at 1400.

claims of rape, which otherwise would be within the ban of 412.<sup>61</sup>

Federal Rule of Evidence 412(b)(2)(A) exception admits evidence of the complainant's prior sexual conduct with persons other than the accused in two limited instances: to prove that someone else, or to suggest that someone else, is the source of semen in the complainant or the source of the injury to her.<sup>62</sup>

Let me just talk about what a couple of courts have found to fall or not fall within this exception. An injury within this exception does not include an enlarged hymen or a ruptured hymen.<sup>63</sup> That physical state does not admit evidence of prior sexual conduct under 412(b)(2)(A).<sup>64</sup> An injury within this exception does not include an emotional injury unaccompanied by physical symptoms.<sup>65</sup> The term "injury" has also been held not to include evidence of child abuse.<sup>66</sup> That is why in the prior case that we discussed, the *Bear Stops* case, to get such evidence admitted to explain a child's sexual abuse and the symptoms of

61. *Id.* The court reasoned that:

Defendant's substantial interest in presenting an adequate defense, predicated on the concept of complainant's motive or scheme, against the very real possibility of an extended loss of liberty, Defendant's sixth amendment right to confront witnesses against him, and the general constitutional importance of effective cross-examination outweighs the possibility of embarrassment complainant might suffer upon the revelation of her prior allegations of sexual abuse . . . .

*Id.* at 1404.

62. FED. R. EVID. 412(b)(2)(A).

63. *See* United States v. Shaw, 824 F.2d 601 (8th Cir. 1987). In *Shaw*, the court held inadmissible evidence that the condition of complainant's hymen was caused by someone other than the defendant to rebut the government's evidence that the condition of complainant's hymen was consistent with her engaging in sexual intercourse. *Id.* at 605. The court found that although the complainant's hymen was widened and stretched, the complainant did not sustain an injury that would be covered under Rule 412's injury exception because there was no evidence of tears, cuts, scratches, bruises or blood. *Id.*

64. *Id.*

65. *Id.* at 603 n.2 (stating that "it is clear that Rule 412's injury exception does not apply to emotional injuries unaccompanied by a cognizable physical consequence").

66. *Id.*



sex abuse syndrome required us to turn to the constitutional exception.<sup>67</sup> Lacerations in the vagina, or tears or bruises that are not recent, have been held not to be within the injury exception.<sup>68</sup> The injury exception embraces only relevant recent sexual conduct which may have been the cause of the tears or the lacerations which are at issue in the particular case.<sup>69</sup> So evidence of an old injury, an old laceration, will not satisfy the exception so as to permit evidence to be introduced of the complainant's other sexual conduct.

Federal Rule of Evidence 412(b)(2)(B), the consent exception, will sometimes admit evidence of the defendant's past sexual conduct with the victim, but only if the defendant raises the victim's consent as a defense.<sup>70</sup> Where consent is not a defense, this exception does not admit such evidence. So, for example, in a statutory rape case where consent is irrelevant, of course, I do not know why the defendant would want to admit this evidence; it would not be admissible under the (b)(2)(B) exception.

Under 412(c), which specifies the notice and hearing requirements, a failure to follow the dictates of the notice requirements has been held in several cases to justify preclusion of proffered evidence.<sup>71</sup> However, no case has yet so ruled

67. See *supra* notes 48-50 and accompanying text.

68. See *Shaw*, 824 F.2d at 608. "[T]he 'injury' exception allows a court to deviate from Rule 412's general rule only when the evidence establishes an injury - such as a cut, bruise, or tear - that was sustained reasonably close in time to the alleged rape." *Id.*

69. *Id.*

70. FED. R. EVID. 412 (b)(2)(B).

71. See *United States v. Peden*, 961 F.2d 517, 521-22 (5th Cir.) (finding that it was not an abuse of discretion for the trial court to deny admissibility of records where defendant was charged with sexual abuse of a minor because the defendant's attorney never made a proffer of evidence under Rule 412(c)), *cert. denied*, 113 S. Ct. 392 (1992); see also *United States v. Eagle Thunder*, 893 F.2d 950, 954 (8th Cir. 1990) (finding that the defendant "failed to file a written notice of intent to offer the evidence [of a non-recent tear to the complainant's hymen], as required by subdivision (c), and for this reason alone the district court could have denied his offer of proof."); *Shaw*, 824 F.2d at 603 n.2 (finding that the trial court did not abuse its discretion in rejecting evidence of other injuries partly because the defendant's motion was untimely under Rule 412(c)).

exclusively on that ground. There has always also been an alternative ruling that the evidence did not fit within one of the 412(b) exceptions for admissibility.<sup>72</sup> So, this specific preclusion provision for failure to make the motion timely in advance of trial or to serve it in the manner specified has never been tested in the United States Supreme Court.

## II. NEW YORK'S RAPE SHIELD STATUTE

Now, let us look at the constitutionality of New York Criminal Procedure Law 60.42,<sup>73</sup> which embodies New York's Rape Shield statute. It works a little differently than the federal statute. As an overview, the New York law bans all evidence of the rape complainant's prior sexual conduct, except in five instances. First, on its face, it makes admissible all evidence of the complainant's prior sexual relations with the defendant.<sup>74</sup> Second, prostitution convictions of the complainant occurring within three years of the event in issue are admissible.<sup>75</sup> Third, defense evidence of the complainant's other sexual conduct would be admissible to rebut prosecution evidence that the victim did not engage in sexual intercourse or deviant sexual intercourse.<sup>76</sup>

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72. See *Eagle Thunder*, 893 F.2d at 954 (stating alternate ruling that evidence of non recent tear in hymen was not relevant to source of recent tears and therefore inadmissible under Rule 412(b)(2)(A)); see also *Shaw*, 824 F.2d at 605 (stating alternate ruling that evidence of victim's past sexual behavior was inadmissible because the defense failed to show that there was an injury under Rule 412(b)(2)(A)).

73. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).

74. N.Y. CRIM. PROC. LAW § 60.42(1). See *People v. Souvenir*, 83 Misc.2d 1038, 373 N.Y.S.2d 824 (Crim. Ct. N.Y. County 1975) (holding that the fact that complainant and defendant knew each other and may have engaged in sexual relations in the past would be admissible evidence).

75. N.Y. CRIM. PROC. LAW § 60.42(2); Cf. *People v. Conyers*, 86 Misc.2d 754, 382 N.Y.S.2d 437 (Sup. Ct. N.Y. County 1976) (holding that where consent was not at issue the accused was not allowed to offer evidence regarding complainant's acts as a prostitute), *aff'd*, 63 A.D.2d 634, 405 N.Y.S.2d 409 (1st Dep't 1978).

76. N.Y. CRIM. PROC. LAW § 60.42(3). See *People v. Smith*, 113 A.D.2d 905, 493 N.Y.S.2d 623 (2d Dep't), *appeal denied*, 66 N.Y.2d 922, 489 N.E.2d 782, 498 N.Y.S.2d 1037 (1985). In *Smith*, the appellate division found

Fourth, the New York rule would admit such evidence to rebut or explain that the defendant is not the source or cause of pregnancy or disease or semen found in the victim.<sup>77</sup> And fifth, the catchall provision, would admit evidence of the complainant's other sexual conduct whenever it is relevant and admissible in the interest of justice.<sup>78</sup> The catchall exception does not require a court to construe the constitution to determine whether the constitution requires the admission of the evidence each time one of the other enumerated exceptions is inapplicable because serving the interest of justice is a sufficient ground for admitting the evidence.

Now, there are five chief differences that I want to point out to you between the federal and New York rape shield laws. First of all, New York does not ban reputation and opinion evidence.<sup>79</sup> If evidence of the victim's prior sexual conduct is admissible, this particular form of the evidence is not automatically banned by the statute.<sup>80</sup>

Second, New York fails to have any notice or hearing requirement for the first four exceptions.<sup>81</sup> Only the fifth exception, the catchall exception, requires a defendant to make a

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no error on the part of the trial court in limiting the defense counsel's questioning of the complainant, a lesbian who claimed she never participated in heterosexual conduct, to inquiries regarding her heterosexual experiences. *Id.*

77. N.Y. CRIM. PROC. LAW § 60.42(4). *See* People v. Labenski, 134 A.D.2d 907, 521 N.Y.S.2d 608 (4th Dep't 1987). The court in *Labenski* held that the trial court should have permitted questioning about rape victim's prior sexual conduct with her boyfriend where the court admitted evidence of semen found on victim's panties. *Id.*

78. N.Y. CRIM. PROC. LAW § 60.42(5). *See* People v. Williams, 81 N.Y.2d 303, 311, 614 N.E.2d 730, 733, 598 N.Y.S.2d 167, 170 (1993) (noting that section 60.42(5) is a provision that is designed to further the "interest of justice" over which the trial court has discretion); People v. Westfall, 95 A.D.2d 581, 469 N.Y.S.2d 162 (3d Dep't 1983) (affirming the lower court's refusal to permit cross-examination of the defendant concerning sexual relations with the father of the defendant because the father was not the accused).

79. *See generally* N.Y. CRIM. PROC. LAW § 60.42, *supra* note 2.

80. N.Y. CRIM. PROC. LAW § 60.42.

81. *See generally* N.Y. CRIM. PROC. LAW § 60.42, *supra* note 2.

proffer outside the hearing of the jury.<sup>82</sup> The proffer could occur right in the middle of a trial, and the court may conduct such hearing as it sees fit before it gives its ruling with an explanation of its findings of fact. So, there is no notice or hearing requirement except for the fifth exception and these requirements are weaker than in the federal rule.

The New York statute is both broader and narrower in what it would admit on its face. The federal statute does not seem to allow for prostitution convictions whatsoever.<sup>83</sup> On the other hand, the federal statute allows the defendant to prove that he is not the source of semen wherever it is found.<sup>84</sup> It could be found on the complainant's clothing, on sheets, or elsewhere and the federal rule exception would apply. Under the New York statute, the exception applies only where the defendant seeks to deny he is the source of semen found in the victim.<sup>85</sup> If the source of semen is found on the victim's clothes or on bed sheets, the semen exception, under the New York Rape Shield Law, does not require its admission. Of course, one could go to the catchall exception and argue there that the interest of justice would require the admission of the evidence as an alternative explanation for the semen found.<sup>86</sup>

Fourth, in New York the victim is not served with a defense motion or proffer of the evidence of her other sexual activity sought to be introduced, she has no notice beforehand of the defendant's wish to introduce evidence of her prior sexual conduct, and she cannot appeal a ruling admitting such evidence.<sup>87</sup> She has no standing to appeal an adverse ruling.<sup>88</sup>

And fifth, unlike the federal rule, New York does not construe a complainant's prior claims of rape to be sexual conduct within

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82. N.Y. CRIM. PROC. LAW § 60.42(5).

83. *See generally* FED. R. EVID. 412, *supra* note 1. Perhaps some prostitution convictions would be admissible if the constitution required their admissibility. *See supra* notes 44-61 and accompanying text.

84. FED. R. EVID. 412(b)(2)(A).

85. N.Y. CRIM. PROC. LAW § 60.42(4).

86. N.Y. CRIM. PROC. LAW § 60.42(5).

87. *See generally* N.Y. CRIM. PROC. LAW § 60.42, *supra* note 2.

88. *See generally* N.Y. CRIM. PROC. LAW § 60.42, *supra* note 2.

the ban of its Rape Shield law.<sup>89</sup> Now, that does not mean that prior claims of rape are automatically admitted. They must still pass a threshold relevance test to see whether or not they bear in some relevant way on the defendant's theory of his case.<sup>90</sup>

So, those are the five chief differences. And if time permits, let me just talk about one or two illustrative cases under each of the sections.

Section 60.42(1), which on its face admits evidence of all prior sexual conduct with the defendant has been limited in the *Westfall*<sup>91</sup> case to those instances where the defendant's defense is consent. Section 60.42(2), which on its face admits all prior prostitution convictions of the complainant that have occurred within three years has similarly been limited. In the *Conyers*<sup>92</sup> case, the court limited the admissibility of prostitution convictions to those instances where the defendant's defense is consent. The third New York exception, 60.42(3), which allows rebutted evidence about the complainant's sexual conduct, was held in one case to allow a defendant, where the complainant testified that she did not give consent because, in fact, she was a lesbian, to prove that at a certain point four or five years remote she had been heterosexual and had engaged in heterosexual contact.<sup>93</sup>

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89. See *People v. Harris*, 132 A.D.2d 940, 518 N.Y.S.2d 269 (4th Dep't 1987) (allowing evidence that the victim had made two prior claims of rape within one year of the alleged rape).

90. See *People v. Mandel*, 48 N.Y.2d 952, 953, 401 N.E.2d 185, 187, 425 N.Y.S.2d 63, 64 (1979) (refusing to admit evidence of past complaints by the victim due to the lack of a "significant probative relation" between those past charges and the current complaint facing the defendant), *cert. denied*, 446 U.S. 949 (1980).

91. *People v. Westfall*, 95 A.D.2d 581, 583, 469 N.Y.S.2d 162, 164 (3d Dep't 1983) ("[T]he relevance of the victim's previous sexual conduct with the accused will generally bear on the issue of consent . . .").

92. *People v. Conyers*, 86 Misc. 2d 754, 382 N.Y.S.2d 437 (N.Y. Sup. Ct. N.Y. County 1976), *aff'd*, 63 A.D.2d 634, 405 N.Y.S.2d 409 (1st Dep't 1978).

93. See *People v. Smith*, 192 A.D.2d 806, 596 N.Y.S.2d 539 (3d Dep't 1993), *supra* note 76.

Now, there is a general catch-all provision in both statutes<sup>94</sup> and this is where the most discussion occurs. So let me just talk about a couple of cases which illustrate when the catch-all exception has been held to admit evidence.

In the *Mandel*<sup>95</sup> case, the New York Court of Appeals ruled that evidence of the complainant's prior sexual conduct was admissible because the interests of justice so required. In that case, the defendant's theory was that the complainant fabricated her charge of rape. This was, according to the defendants, an instance of consensual group sex until, during the sexual act, water balloons fell out of the complainant's bra, which caused the defendants to burst out laughing, which in turn allegedly enraged the woman.<sup>96</sup> The defense claimed that this turn of events provided her with a motive to fabricate the rape charges, and given that theory, the court ruled the constitutional exception required evidence that on other prior occasions of the complainant's sexual conduct, when it would have been natural for the woman to permit someone to touch her breasts, she had not permitted such action.<sup>97</sup> Additionally, it allowed evidence that she appeared to have unusually large breasts.<sup>98</sup>

The *Latzer*<sup>99</sup> case involved sexual acts allegedly committed on minor boys. In the *Latzer* case, Judge Glasser granted a writ of habeas corpus to require evidence that the minor boy complainants had engaged in other acts of deviant sexual intercourse, with numerous other men, at the particular location

94. FED. R. EVID. 412(b)(1); N.Y. CRIM. PROC. LAW § 60.42(5).

95. *People v. Mandel*, 48 N.Y.2d 952, 401 N.E.2d 185, 425 N.Y.S.2d 63 (1979), *cert. denied*, 446 U.S. 949 (1980).

96. *People v. Mandel*, 61 A.D.2d 563, 569, 403 N.Y.S.2d 63, 68 (2d Dep't 1978), *rev'd*, 48 N.Y.2d 952, 401 N.E.2d 185, 425 N.Y.S.2d 63 (1979), *cert. denied*, 446 U.S. 949 (1980).

97. *Id.*

98. *Id.* at 574, 403 N.Y.S.2d at 71. An 18-year old student who had sexual relations with the complainant alleged in an affidavit that the "complainant had never permitted him to touch her exceptionally large breasts." *Id.*

99. *Latzer v. Abrams*, 602 F. Supp. 1314 (E.D.N.Y. 1985).

where the incident in question occurred.<sup>100</sup> The defense theory was one of mistaken identity. Furthermore, there was enough discrepancy in the boys' identification testimony that Judge Glasser thought it was relevant for the jury to know that the complainants had numerous instances of sexual contact with other men, all of which were rather brief. This evidence related to identification, an issue in the case, and supported the theory of mistaken identity.<sup>101</sup>

One New York Court of Appeals case which did not require the evidence of the complainant's prior sexual conduct was the *Williams*<sup>102</sup> case. In *Williams*, the New York Court of Appeals, for the first time, upheld the constitutionality of the Rape Shield statute.<sup>103</sup> In that case, a woman claimed that she had been raped

100. *Id.* Judge Glasser found that the "petitioner's confrontational rights guaranteed by the Sixth and Fourteenth Amendments were violated when the cross-examination of two key witnesses was unduly restricted." *Id.* at 1315.

101. *Id.* at 1316. One brother testified that Bob Fox, the man with whom they had sexual contact, was 5'5" tall, and at trial, the defendant "was measured at 5'9 1/2" without shoes and 5'10 3/4" with shoes." *Id.* A second discrepancy was that another brother described Bob Fox as having gray hair, and the defendant had dirty blond hair. *Id.* A third discrepancy was that Matthew stated to police that he first met Bob Fox on July 4, 1981, six months after the date of the alleged crime. *Id.* The court stated that "[p]etitioner had thus established a sufficient foundation for his defense of mistaken identification to justify cross-examination of the brothers regarding their sexual history for purposes of further supporting that defense." *Id.* at 1320.

102. *People v. Williams*, 81 N.Y.2d 303, 614 N.E.2d 730, 598 N.Y.S.2d 167 (1993).

103. *Id.* "The constitutional standard is one of arbitrariness." *Id.* at 315, 81 N.E.2d at 735, 598 N.Y.S.2d at 172 *see* N.Y. CRIM. PROC. LAW § 60.42(5) (McKinney 1992) (providing that a trial court is only required to hear an "offer of proof by the accused" and provide a "statement . . . of its findings of fact"). In *Williams*, the defense was given two opportunities to discuss the evidence and demonstrate its relevance. 81 N.Y.2d at 314, 614 N.E.2d at 735, 598 N.Y.S.2d at 172. The court then gave a statement of its findings and ruled that the evidence was inadmissible. *Id.* The trial court's denial of this evidence was not arbitrary. *Id.* at 315, 614 N.E.2d at 735, 598 N.Y.S.2d at 172. Therefore, the defendants' federal constitutional due process rights, and rights to confront witnesses, were not violated. *Id.* at 312, 614 N.E.2d at 733, 598 N.Y.S.2d at 170.

by a number of black men; the complainant was white.<sup>104</sup> The defendants wanted to offer evidence of other instances of group sex between the complainant and black men, allegedly to explain her motive to testify against these defendants.<sup>105</sup> That was the proffer, in its entirety, of the defense theory of the relevance of the evidence of the complainant's other sexual conduct. The New York Court of Appeals ruled this was an illogical proffer.<sup>106</sup> The court ruled the proffer did not bear on, or explain at all, a motive to fabricate charges - it did not explain at all a motive to have brought this action that would make us suspect the charge of rape was false.<sup>107</sup> And so in that case, because the proffer did not pass a threshold test of relevance, the interests of justice did not require admission of that other conduct. Some might argue that this evidence was somewhat relevant to the issue of consent.<sup>108</sup> But this is the type of reasoning the statute was specifically

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104. *Williams*, 81 N.Y.2d at 311, 614 N.E.2d at 733, 598 N.Y.S.2d at 170.

105. *Id.* at 315, 614 N.E.2d at 735, 598 N.Y.S.2d at 172; *see* N.Y. CRIM. PROC. LAW § 60.42(5) (barring evidence of a victim's past sexual conduct unless such evidence is found by the court to be "relevant and admissible in the interests of justice").

106. *Williams*, 81 N.Y.2d at 315, 614 N.E.2d at 735, 598 N.Y.S.2d at 172. "Though given a full opportunity to do so, counsel made no effort to explain how prior sexual conduct with other males would be probative of the complainant's motive to testify -- a connection neither apparent nor logical on its face." *Id.*

107. *Id.* at 315, 614 N.E.2d at 735, 598 N.Y.S.2d at 172. The defense counsel gave no explanation as to how the evidence, that the rape victim had previously engaged in group sex, was probative of the victim's motive to testify, and did not "suggest that the evidence might be relevant to the question of consent . . . ." *Id.*

108. *Id.* As an alternate theory, the defendants alleged that they erroneously believed that the victim had consented to this sexual conduct. *Id.* at 316, 614 N.E.2d at 736, 598 N.Y.S.2d at 173. Therefore, they alleged that "their mistaken belief negated the intent necessary for a finding of guilt on the various counts." *Id.* However, the New York Court of Appeals stated that "it is unnecessary to forcibly compel another to engage in sexual acts unless that person is an unwilling participant. Thus, the jury, by finding that defendants used forcible compulsion to coerce the victim to engage in sodomy and intercourse, necessarily found that defendants believed the victim did not consent . . . ." *Id.* at 317, 614 N.E.2d at 736-37, 598 N.Y.S.2d at 173-74.



designed to foreclose. The purpose of the Rape Shield laws is a legislative determination that prior consent on other occasions to have sex, with other people, whether it be group sex, whether it be interracial, whatever it may be, is irrelevant to the question of consent in the particular instance on trial.<sup>109</sup>

## CONCLUSION

Let me just leave you with two of my own thoughts. If I were administering changes to Federal Rule of Evidence 412,<sup>110</sup> I would recommend changing the catch-all exception to be similar to the New York statute so that we could avoid a constitutional analysis in every instance. As it now stands, the rule requires courts to determine whether or not confrontation rights and other important criminal constitutional rights are violated if the evidence is foreclosed. I think the New York approach of determining whether or not the interests of justice require the admission would probably admit not that much more evidence of sexual history, yet has the virtue of avoiding frequent constitutional analysis.

Secondly, if I were to urge the New York legislature to do something, it would be to adopt notice requirements. Notice requirements would serve the interests of the legislature in enacting the Rape Shield law: to avoid unfair surprise and harassment of the victim; to avoid unfair surprise to the prosecution; and to give the court a thorough basis for evaluating the admissibility of the evidence. Thank you.

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109. *Id.* at 312, 614 N.E.2d at 733, 598 N.Y.S.2d at 170. The purpose of the Rape Shield law is to protect the victim from harassment and to not confuse the jurors. *Id.* The victim's past "unchastity" is not probative of current consent and is "of little or no relevance and may seriously prejudice the prosecution of sex crimes." *Id.*

110. See *infra* notes 111-32 and accompanying text for proposed changes to Federal Rule of Evidence 412 which become effective December 1, 1994, unless Congress takes action to the contrary.

Following the Symposium, on April 8, 1994, the United States Supreme Court proposed significant changes to Federal Rule of Evidence 412. The changes take effect December 1, 1994, unless Congress takes action to the contrary. Proposed Federal Rule of Evidence 412,<sup>111</sup> the rape shield rule, would be extended to apply in all criminal cases.<sup>112</sup> It would no longer be confined to those instances where the defendant was charged with rape or

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111. FED. R. EVID. 412 (proposed). The proposed rule provides:

(a) Evidence Generally Inadmissible. The following evidence is not admissible in any criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and
- (2) evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

- (1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
- (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
- (3) evidence the exclusion of which would violate the constitutional rights of the defendant.

(c) Procedure to Determine Admissibility.

- (1) A party intending to offer evidence under subdivision (b) must:

- (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
- (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

- (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

*Id.*

112. *See* FED. R. EVID. 412(a) (proposed).

another sex offense.<sup>113</sup> Hence, it is no longer just a “rape shield,” and such a name is a misnomer. Proposed Federal Rule of Evidence 412 would bar evidence of the alleged victim’s “other sexual behavior” as well as evidence offered to prove the alleged victim’s “sexual predisposition.”

The proposed rule as submitted to Congress deleted, at the eleventh hour, a provision that would have extended application of the rule to all civil cases.<sup>114</sup> Indeed, the deletion appears to have occurred so late that the currently available legislative history accompanying this proposed rule describes the amendment as it applies to civil cases.<sup>115</sup> One can only speculate that, despite its omission from the current version of the proposed rule, extending the rule’s nearly absolute ban on evidence of a victim’s “other sexual behavior” and “sexual predisposition” to civil cases is still under serious consideration by the Committee.

Proposed Federal Rule of Evidence 412 works broad changes. The extension of the shield law’s exclusionary rule from sex offenses to all criminal offenses is sound.<sup>116</sup> There is no strong

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113. FED. R. EVID. 412(a) (proposed). The present rule only applies “in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code.”

114. The Honorable Chief Justice William H. Rehnquist, by letter dated April 29, 1994, wrote to the Honorable John F. Gerry, Chair, Executive Committee of the Judicial Conference, that approval has been withheld of that portion of the proposed amendments to Rule of Evidence 412 which would apply that Rule to civil cases, and make evidence of the sexual behavior or predisposition . . . admissible only if “its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.”

Letter from Honorable Chief Justice William H. Rehnquist to Honorable John F. Gerry (April 29, 1994) in H.R. DOC. 250, 103d Cong., 2d Sess. (1994).

115. The committee note accompanying the published proposed amendment to Federal Rule of Evidence 412 incorrectly states “Rule 412 applies to both civil and criminal proceedings.” The committee note also indicates that Rule 412’s amendment was intended to “apply in a Title VII action in which the plaintiff has alleged sexual harassment.” FED. R. EVID. 412 advisory committee’s note (proposed). *But see infra* note 120.

116. The committee notes indicate that the revised rule “applies in all cases involving sexual misconduct without regard to whether the alleged victim or

policy reason requiring the sexual activities of a victim of a crime to be admitted in evidence at a criminal trial, except in the few circumstances the statute provides. Extending the ban on evidence of an alleged victim's sexual activities to include all criminal proceedings, not just rape trials, would close a gap in the law that has continued contrary to the underlying purposes of Federal Rule of Evidence 412. The purposes of the revised rule as summarized by the committee are to "diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct."<sup>117</sup> The rule further aims to protect the alleged victim against "invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process."<sup>118</sup> The rule is also intended, by protecting victims, to encourage "victims of sexual misconduct to institute and participate in legal proceedings against alleged offenders."<sup>119</sup>

There is no compelling reason to allow evidence of an alleged victim's sexual experience into evidence in criminal trials, charging crimes other than a sex offense, when such evidence is barred, except in limited circumstances, from trials charging a sex offense. Indeed, there ought be fewer instances when an alleged victim's sexual experience could be relevant or constitutionally required where the crime charged against the accused is not a sex offense. This proposed amendment makes sense and is overdue. It is also consistent with Congress' goal to eliminate barriers that cause victims of crime to under report crime or refuse to testify.

Let me give an example of when this change would matter. Suppose someone kidnaps a victim for the purpose of committing rape, but does not succeed far enough in his acts to attempt or

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person accused is a party to the litigation . . . [and to] 'pattern' witnesses . . . whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible." FED. R. EVID. 412 advisory committee's note (proposed).

117. *Id.*

118. *Id.*

119. *Id.*

commit rape. He could be charged criminally only with kidnapping, which is not a sex offense and, thus, not restricted by Federal Rule of Evidence 412. At trial, under the rule as currently written, the defense is free to offer evidence of the victim's alleged sexual activities with others so long as that evidence is otherwise admissible under the rules and he might use this evidence to argue he did not kidnap the victim, but rather that she voluntarily accompanied him for the purpose of having sex. Introduction of the evidence of sexual history is inconsistent with Congress' judgment that a victim's sexual activity with other persons on other occasions is generally irrelevant to the question of the victim's consent to the event charged. Of course, the defense is free to argue the alleged victim voluntarily accompanied him for the purpose of consensual sex, but without introducing evidence of the victim's prior sexual experience. Congress has already determined such evidence should be admissible only in the limited exceptions and for the limited purposes recognized by the shield statute. Yet because kidnapping, not rape, was charged, Rule 412's ban did not apply.

On the other hand, not extending the prohibition of proposed Federal Rule of Evidence 412, as written, to civil cases seems the sounder course at present.<sup>120</sup> A different rule may well be appropriate in civil trials. There is a strong public interest in encouraging victims to report crime and testify which is impeded when the victim fears inquiry, occurring at a public criminal trial, into the details of her personal life. Since criminal proceedings limit pre-trial discovery, in the absence of the

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120. Minutes of the Meeting of the Advisory Committee on Evidence Rules on May 6-7, 1993 (discussing FED. R. EVID. 412 (proposed)). Michael A. Cooper, Esq., appearing as Chair of the American College of Trial Lawyers' [hereinafter ACTL] Federal Rules of Evidence Committee, stated that the "ACTL Committee considers it good sense to extend Rule 412 to all criminal cases, but has some reservations about extending the rule to all civil cases, particularly employment discrimination cases under Title VII." *Id.* However, Michael Chepiga, Esq., testifying on behalf of the Federal Courts Committee of the Association of the Bar of the City of New York, advocated an "'essential issue' test for civil cases rather than the proposed alternative balancing test . . . ." *Id.* Mr. Chepiga favors an extension of Rule 412 to civil matters.

protection of the rape shield statute, victims lack advance notice and have to expect the worst humiliation by the defense in its attempt to discredit the witness. This inhibits the filing of criminal charges.

Of course there is also a public interest in encouraging meritorious civil lawsuits to remedy private wrongs. The public interest differs, however, in several ways. In a civil case, the fear of public exposure of one's intimate activities may not as frequently deter the bringing of charges. For one thing, there is an incentive to bring a civil suit that does not exist in the filing of a criminal complaint -- the hope or expectation of the private recovery of damages. In civil cases, there also may not be someone whose position is akin to that of the "victim" in criminal cases -- and the rule only precludes evidence of a "victim's" sexual experience, a term the interpretation of which has to be stretched before it readily applies in civil matters. Evidence of an alleged victim's "sexually provocative speech or dress" may also sometimes be relevant in employment harassment cases or other civil sexual harassment cases.<sup>121</sup> Perhaps more importantly, the rules of discovery in civil cases, unlike criminal proceedings, already afford substantial protection against surprise at trial, undue harassment of a witness or party, and ample means to prevent an adversary's probing into irrelevant personal matters.

In civil cases, federal judges have the power, under Federal Rule of Civil Procedure 26(c),<sup>122</sup> to grant protective orders. Such

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121. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986).

122. FED. R. CIV. P. 26(c). This rule provides:

Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

an order can determine that the area of inquiry is irrelevant and therefore, should be foreclosed.<sup>123</sup> Alternatively, the protective order may determine the area of inquiry is relevant, in which case, questioning is appropriate. Even in such instance, however, the court has the ability to protect the privacy interest of the civil litigant by sealing the deposition or other pretrial evidence gathering device.<sup>124</sup> Further, the court can limit access to the sealed record to those few persons who require access to the information for the purpose of the civil litigation, restricting use of the information to the purposes of the litigation and prohibiting anyone with access to the information from any further use or dissemination of the information in any form.<sup>125</sup> By invoking

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- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
  - (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
  - (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
  - (5) that discovery be conducted with no one present except persons designated by the court;
  - (6) that a deposition, after being sealed, be opened only by order of the court;
  - (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and
  - (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

*Id.*

123. *Id.*

124. See *Nault's Auto. Sales, Inc. v. American Honda Motor Co., Inc. Acura Auto. Div.*, 148 F.R.D. 25 (D. N.H. 1993) (stating that judge must consider the important constitutional and common law interests in public access to judicial records as well as the interests of the litigants); *American Securit Co. v. Shatterproof Glass Corp.*, 20 F.R.D. 196 (D. Del. 1957) (noting that the entry of an order of secrecy is discretionary with the court).

these measures, harassment and embarrassment from unfair pretrial discovery into a civil litigant's or a witness' sexual activities should be curtailed substantially, if not eliminated completely. Thus, the tools exist in the civil context to prevent abusive inquiry and harassment.

Because of pretrial civil discovery, there ought be no surprise at a civil trial.<sup>126</sup> A party can move to preclude his adversary's evidence and the court, being already apprised of the potential evidence, is in a position to determine its relevance and rule on its admissibility before the line of questioning of witnesses is offered.

The court will admit the evidence only where it satisfies the requirements of relevance<sup>127</sup> such that its probative value is not substantially outweighed by unfair prejudice or confusion of issues.<sup>128</sup> Thus, the goals of the rape shield statute -- to avoid prejudice, to minimize the introduction of confusing material and to eliminate harassment of witnesses -- are goals already subject to substantial accomplishment in the civil proceeding without resort to Federal Rule of Evidence 412.

There is perhaps a further reason why proposed Federal Rule of Evidence 412 as written ought not be extended to civil matters. The few limited exceptions it would recognize -- when the constitutional rights of the defendant<sup>129</sup> would otherwise be

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125. See *Carr v. Monroe Mfg. Co.*, 431 F.2d 384 (5th Cir. 1970), *cert. denied*, *Aldridge v. Carr*, 400 U.S. 1000 (1971) (stating that the trial court is bound by public policy to limit the availability and use of protected documents); *cf. Alliance to End Repression v. Rochford*, 75 F.R.D. 431 (N.D. Ill. 1976) (noting that protective order was limited to defendant's means of gathering information).

126. See *Burke v. Fire Underwriters Ass'n*, 21 F.R.D. 583 (W.D. Mo. 1958) (stating Federal Rules of Civil Procedure are to be employed to eliminate surprise and allow parties to obtain sufficient information for trial); *New England Terminal Co. v. Graver Tank & Mfg. Corp.*, 1 F.R.D. 411 (D.C. Cir. 1940) (finding that an object of the Federal Rules of Civil Procedure was to demand simplicity and avoid surprise).

127. FED. R. EVID. 401.

128. FED. R. EVID. 403.

129. FED. R. EVID. 412 (b)(1) (proposed).



violated, when consent<sup>130</sup> is an issue, or to prove someone else is responsible for the source of semen, injury or physical evidence<sup>131</sup> -- are geared to criminal cases. These several exceptions as written do not contemplate the myriad of civil actions that have no criminal counterpart, but where sexual experience might be relevant.

Until someone examines the scope of exceptions that would be just in the civil context because of the relevance of the evidence, it would enact an unsound blanket prohibition against such evidence. The ban of the evidence required by Federal Rule of Evidence 412 needs to be refined to consider its full impact on civil cases before it should be extended to apply in civil trials. Not extending the total ban of Federal Rule of Evidence 412 to civil matters until exceptions that consider when such evidence may be appropriately admitted in civil trials should not work any unfairness or injustice to parties or witnesses or the outcome of proceedings. Congress' goals in enacting Federal Rule of Evidence 412 are already largely, if not completely, capable of being accomplished under the existing Federal Rules of Civil Procedure and Rules of Evidence.

Another significant revision embodied in proposed Federal Rule of Evidence 412 is the ban on evidence regarding an alleged victim's "sexual predisposition." This term is not defined in the statute and will require judicial construction. A dictionary definition defines predisposition as the "condition of being predisposed: inclination, tendency less than habits . . . ."<sup>132</sup> By this term, Congress may be attempting to foreclose any evidence that an alleged victim has a tendency or proclivity to agree to or engage in sexual activity or to refuse to agree to sexual activity. But the term could encompass more, such as precluding evidence that an alleged victim prefers or disdains particular types of sexual activity, such as group sex, homosexual activity, interracial sex, or other more specific types of sexual acts. Congress' judgment appears to be that a person's having engaged

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130. FED. R. EVID. 412 (b)(2)(B) (proposed).

131. FED. R. EVID. 412 (b)(2)(A) (proposed).

132. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981).

in a particular type of sexual activity before, even to an extent that reaches the level of a “sexual predisposition,” is nonetheless, with few exceptions, irrelevant to the determination of what happened during the specific event complained about in the criminal case. This judgment is sound and consistent with Congress’ goal of seeking to eliminate prejudicial and confusing evidence from criminal trials and avoiding harassment of alleged victims.

*Hon. George C. Pratt:*

Thank you, Professor Bartel. One thing that you pointed out would just illustrate what was brought up this morning; it really contradicts a fear that was brought up this morning in connection with codification -- the fear that if the rules are codified, it will tend to operate as a straitjacket. This does not seem to have happened in New York. The rule with respect to the use of the prostitution convictions - the courts had no hesitancy in overlaying a limitation that it be where consent is a defense. Probably the people who are most concerned with the fairness of the operation of rules of evidence are judges, because they sit and their job is to try to see that at least there has been a fair trial. And judges, more than anyone else, see the detailed everyday operation of rules of evidence over a series of cases. They have an instinct for what is necessary in order to keep the scales of justice in balance. I have great faith, as I do in juries, in judges to handle the rules of evidence no matter what the codifiers say.

